Supreme Court, U.S.
FILED
SEP 2 1992
OFFICE OF THE CLERK

No. 92-130

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. A regulation (29 C.F.R. 1.7(d)) promulgated by the Department of Labor to implement the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, permits contractors on federal construction projects to employ semi-skilled "helpers" if the classification is "prevailing" in the applicable geographic area. The first question presented is whether the Secretary violated the Davis-Bacon Act or the Administrative Procedure Act, 5 U.S.C. 706, in promulgating the regulations (29 C.F.R. 1.7(d)(1) and (2)) defining when a helper class is "prevailing" in a given area.

2. Whether a provision in a 1991 supplemental appropriations Act that prohibited the Secretary from expending funds to implement or administer the helper regulations permanently suspends the effect of those regulations, even though the relevant provision contains no words of futurity or permanence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Batterton v. *Francis*, 432 U.S. 416 (1977)	11
Building & Construction Trades Dep't v. *Donovan*, 464 U.S. 1069 (1984)	12
Cella v. *United States*, 208 F.2d 783 (7th Cir. 1953), cert. denied, 347 U.S. 1016 (1954)	18
Chiles v. *Thornburgh*, 865 F.2d 1197 (11th Cir. 1989)	18
International Union, United Automobile Workers v. *Donovan*, 746 F.2d 855 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985)	20
Minis v. *United States*, 40 U.S. (15 Pet.) 423 (1841)	18
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981)	11, 12
United States v. *Vulte*, 233 U.S. 509 (1914)	18

Statutes and rules:

Davis Bacon Act, 40 U.S.C. 276a *et seq.*	2
40 U.S.C. 276a(a)	2, 11, 17
Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. No. 102-170, 105 Stat. 1107	20
105 Stat. 1110	20
105 Stat. 1114 (§§ 102-104)	20

Statutes and rules—Continued: Page

Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151 ..... 9, 17

29 C.F.R.:

Section 1.2(a) 2, 3
Section 1.2(a)(1) 13
Section 1.3 3
Section 1.5 3
Section 1.6 3
Section 1.7(d) 7
Section 1.7(d)(1) (1991) 12, 13
Section 1.7(d)(2) (1991) 12, 13
Section 5.2(n)(4) 14
Section 5.5(a)(1) 3

Miscellaneous:

138 Cong. Rec.:

p. S13,446 (daily ed. Sept. 15, 1992) 19
p. S13,483 (daily ed. Sept. 15, 1992) 19
p. S14,027 (daily ed. Sept. 18, 1992) 19
pp. S14,038-S14,039 (daily ed. Sept. 18, 1992) 19

Daily Lab. Rep. (BNA) No. 183 (Sept. 21, 1992) 19

54 Fed. Reg. (1989):

p. 4,234 ..... 7, 8, 15
pp. 4,234-4,244 9
pp. 4,327-4,328 15
p. 4,238 ..... 7, 8, 14, 16
p. 4,242 ..... 15, 16
p. 4,243 8

52 Fed. Reg. (1987):

pp. 31,366-31,367 6
p. 31,370 ..... 15, 16

47 Fed. Reg. (1982):

p. 23,647 ..... 3, 4

Miscellaneous—Continued:	Page
pp. 23,650-23,651	15
p. 23,655	4
p. 23,659	3
p. 23,667	4
p. 23,670	4
pp. 31,368-31,371	15
46 Fed. Reg. (1981):	
pp. 41,443-41,470	3
p. 41,445	3
General Accounting Office, *Principles of Federal Appropriations Law* (2d ed. 1991)	18, 19
H.R. 5620, 102d Cong., 2d Sess. (1992)	19

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-130

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

LYNN MARTIN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 961 F.2d 269. The opinion of the district court (Pet. App. 60a-71a) is reported at 116 Lab. Cases (CCH) ¶ 35,395.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1992. The petition for a writ of certiorari was filed on July 20, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, requires payment of at least locally prevailing wages to workers on contracts exceeding $2,000 with the United States or the District of Columbia for construction on public buildings or public works. In particular, the Act provides that covered federal construction contracts

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed.

40 U.S.C. 276a(a). Section 276a(a) therefore provides that the locally prevailing wage for each class of laborers or mechanics is to be "determined by the Secretary." *Ibid.*

Pursuant to that "broad statutory mandate to set wages and classify workers" (Pet. App. 3a), the Secretary has promulgated regulations that provide for determination of the "prevailing wage" rate; specify the kind of data that she will use in the calculations; set forth procedures for particular wage determinations; and describe enforcement procedures. The Secretary has defined the "prevailing wage" as "the wage paid to the majority * * * of the laborers or mechanics in the classification on similar projects in the area during the period in question." 29 C.F.R. 1.2(a). If the same wage is not paid to a majority of the workers in a classification, the Secretary uses "the average of the wages paid, weighted by the total

employed in the classification." *Ibid.* To make that determination, the Secretary compiles wage information categorized by the type of project, locality, and job classification. 29 C.F.R. 1.3. Based on the information, she issues "wage determinations" (29 C.F.R. 1.5, 1.6), and covered contracts must provide for the payment of wages and fringe benefits at rates no less than those established by the Secretary's determination. 29 C.F.R. 5.5(a)(1).

2. Because "wage rates and classifications are essentially two sides of the same coin" and "must be fixed in tandem to ensure that a given wage will be paid for given work" (Pet. App. 49a), the implementation of the Davis-Bacon Act's "prevailing wage" standard requires the Secretary to classify workers for purposes of making wage determinations. Historically, the Secretary has recognized five basic classifications of workers under the Act: (1) journeymen or skilled workers who are identified with traditional crafts and use the tools of the trade; (2) laborers or unskilled workers; (3) apprentices enrolled in apprenticeship programs approved by the Secretary; (4) trainees enrolled in training programs approved by the Secretary; and (5) semi-skilled helpers. *Id.* at 36a. The Secretary included a "helper" classification in a wage determination only if (1) the helper's duties could be differentiated from those of the journeyman, and (2) the helper classification prevailed in the applicable area. *Id.* at 37a; 47 Fed. Reg. 23,647, 23,659 (1982).

On August 14, 1981, the Secretary published a proposed rule revising the Davis-Bacon Act regulations. 46 Fed. Reg. 41,443-41,470. The proposed rule included provisions to broaden the use of the "helper" classification in wage determinations. *Id.* at 41,445. After considering extensive comments on the pro-

posed revisions, the Secretary concluded that broader recognition of a helper classification would better reflect widespread construction industry practice; result in large cost savings to the government; create job opportunities for unskilled and semi-skilled workers, including youth, minorities, and women; enhance productivity by allowing skilled workers to focus more on high-skill tasks; and increase competition for government contracts. 47 Fed. Reg. at 23,647.

Accordingly, the Secretary promulgated several new regulations. First, the new regulations defined "helper" as a "semi-skilled worker * * * who works under the direction of and assists a journeyman." 47 Fed. Reg. at 23,667. Under this definition, a helper may "use the tools of the trade" under a journeyman's supervision, although the "particular duties performed by a helper vary according to area practice." *Ibid.* Second, the regulations provided that a helper classification was to be included in the wage determination if that classification was "identifiable" in the applicable area. *Id.* at 23,655. Third, the regulations limited the maximum number of helpers to two for every three journeymen. *Id.* at 23,670.

3. a. Soon after the new regulations were promulgated, the Building and Construction Trades Department, AFL-CIO, and affiliated unions brought this civil action alleging, *inter alia*, that the new helper regulations were inconsistent with the Davis-Bacon Act. The district court agreed, and enjoined implementation of the regulations. See Pet. App. 76a-78a; see also *id.* at 81a-84a.

b. The court of appeals affirmed in part and reversed in part. The court approved the Secretary's decision to define "helpers" in terms of the level of their supervision by journeymen, rather than by the tasks performed and tools used. Pet. App. 44a-54a.

The court found nothing in the language of the Act that required the use of a task-based classification of workers (*id.* at 47a-48a), and found that limiting the Secretary to that rigid form of classification would thwart the congressional purpose of having federal wages mirror those prevailing in a locality. *Id.* at 50a. In affirming the departure from prior practice, moreover, the court of appeals observed that "the Secretary is not overturning a policy that has worked to perfection," adding that then-existing practice may have caused the federal government to pay wages far above private sector rates in some cases. *Id.* at 52a.

The court, however, held that the new regulation was invalid to the extent that it allowed the helper classification to be used if it was merely "identifiable" in a given area. Pet. App. 41a-44a. Finding that such a rule would permit the use of "helpers" on federal construction projects even if use of such a classification was not a prevailing practice in the area, the court concluded that the rule would "operate[] to undermine the fundamental purpose of the Act: that wages on federal construction projects mirror those locally prevailing." *Id.* at 41a. In the court's view, "if a given lower paid job classification need only be 'identifiable' in the community to be used on a government construction site, the wages paid for some work may well be less than those 'prevailing' for that work in the community." *Id.* at 42a. At the same time, however, the court made clear that the new regulation, "*as modified by the requirement that the classification prevail in an area before it may be used*, [was] an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers." *Id.* at 53a (emphasis added).

c. On remand, the district court rescinded its injunction as it applied to the definition of "helpers," but left the injunction in place with respect to other aspects of the helper regulations. Pet. App. 101a-103a. The court also indicated that the Secretary "may * * * submit * * * reissued regulations governing the use of helpers, and if these regulations conform to the decision of the Court of Appeals, they will be approved." *Ibid.*

4. Consistent with the district court's order, the Secretary reexamined the helper regulations, inviting comments on several alternative proposals for determining when a helper classification is "prevailing" in a particular area. 52 Fed. Reg. 31,366-31,367 (1987). After an extended comment period, the Secretary issued the following final regulation:

> The use of *helpers*, *apprentices* and *trainees* is permitted in accordance with part 5 of this subtitle. Wage rates for semi-skilled classifications of helpers will be issued when the classifications are prevailing in the area. In determining whether the use of a particular helper classification prevails in the area, the Administrator will follow the criteria set forth in paragraphs (d)(1) and (d)(2) of this section.
>
> (1) If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen * * * , then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman shall also be deemed the prevailing practice in determining whether to issue a helper classification. Any ambiguity with regard to such practice, will be resolved by following the rule in paragraph

(d)(2) of this section with respect to those contractors.

(2) If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total number of journeymen * * * , then the total number of workers in the classification employed by contractors utilizing helpers (journeymen plus apprentices, trainees, and helpers as defined in § 5.2(n)(4) of this chapter) on reported projects will be compared to the total number of workers in the classification employed by contractors not utilizing helpers (journeymen plus apprentices and trainees as defined in § 5.2(n)(4) of this chapter), and the practice which covers the majority of such workers shall be deemed the prevailing practice in determining whether to issue a helper classification.

54 Fed. Reg. 4,234 (1989), codified at 29 C.F.R. 1.7(d).

Under the new regulation, if a prevailing wage is paid to journeymen on the basis of the wages paid to a majority of journeymen in a particular area, then a "helper" classification may be used if the contractors paying that prevailing wage use helpers. As the Secretary explained, that approach ensures that where union journeymen predominate, helpers will be used on federal projects only if it is the practice, in accordance with applicable collective bargaining agreements, to use helpers. 54 Fed. Reg. at 4,238. Alternatively, if the wage paid to journeymen in a given area is not based on a "majority wage," then a helper classification can be used only if the total number of journeymen, apprentices, trainees, and helpers in a craft on projects employing helpers exceeds the number of journeymen, apprentices, and

trainees on projects where helpers are not employed. 54 Fed. Reg. at 4,234, 4,243. Thus, the prevailing practice is determined by "link[ing] the number of helpers to the number of journeymen with whom the helpers are associated since, under the approved definition, a helper must work under the direction of, and be supervised by, the journeymen." *Id.* at 4,238.

5. a. Following the promulgation of the new regulations, the Secretary moved to vacate the injunction blocking implementation of its helper regulation. Petitioners (the Building and Construction Trades Department, AFL-CIO, and several affiliated unions) opposed her motion primarily on the ground that the new rule's method of determining when helpers are to be allowed is inconsistent with the Davis-Bacon Act and the Administrative Procedure Act (APA). The district court disagreed, finding that "the Secretary has considered a number of alternatives, including several proposed by [petitioners], and * * * has given reasoned explanations for the rejection of some and the selection of the one ultimately adopted." Pet. App. 63a. The court noted, in this regard, that petitioners' disagreement with the new regulations "demonstrate[s] nothing more than that there are several alternatives for determining whether the use of helpers is prevailing." *Id.* at 64a.

b. The court of appeals affirmed in part and reversed-in part.[1] In addition to contesting the district court's ruling under the Davis-Bacon Act and the APA, petitioners relied in the court of appeals on a rider to

[1] The court invalidated the portion of the helper regulations limiting the number of helpers to two for every three journeymen on the job. Specifically, the court found that the Secretary had not adequately explained the basis for that limitation when the rule was promulgated in 1982. Pet. App. 14a-15a. That issue is not before this Court.

a 1991 supplemental appropriations Act prohibiting the Secretary from spending appropriated funds to implement the helper regulations. See Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151.[2] The court, however, found that the 1991 appropriations rider did not permanently bar implementation of the helper regulations. Pet. App. 7a-9a. Rather, relying on the canon that a provision in an appropriations Act operates only during the applicable fiscal year "unless its language clearly indicates that it is intended to be permanent" (*id.* at 8a), the court found that the absence of any suggestion of "permanency or futurity" in the language of the rider foreclosed petitioners' reliance on the rider after Fiscal Year 1991. *Id.* at 9a.

The court also rejected petitioners' challenge under the Davis-Bacon Act and the APA to the Secretary's methodology for determining whether a helper classification is "prevailing" in a locality. The court concluded that petitioners had "in no way demonstrated that the Secretary acted arbitrarily in designing the new tests, or that the tests defeat the purpose of the Act by recognizing 'non-prevailing

[2] The rider provided (§ 303, 105 Stat. 151) in relevant part:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal Regulations or to implement or administer any other regulation that would have the same or similar effect.

practices.' " Pet. App. 10a. Rather, the court noted, under the new regulations "[a]ny federal project employing the helper category will reflect either the practice of contractors employing a majority of journeymen in the locality or a majority of workers engaged in relevant employment in a weighted average locality." *Id.* at 10a-11a. Further, the court rejected petitioner's claim that using a supervision-based, rather than a task-based, definition of "helpers" would undermine the purposes of the Act by allowing federal contractors to replace many higher-paid journeymen with helpers; that claim, the court explained, had been resolved against petitioners in their earlier challenge to the 1982 regulations. *Id.* at 11a.

The court also found illusory petitioners' contention that the Secretary's regulations would "sweep[] 'higher paid' laborers into the category of 'lower paid' helpers." Pet. App. 12a. First, the court questioned whether semi-skilled helpers would necessarily be paid less than unskilled or semi-skilled laborers. Second, the court noted that the new regulations would give full weight to the amount paid to union laborers; a person classified by the union as a laborer would count as a helper if he satisfied the regulatory definition of "helper." Hence, any "laborers" who in substance served as helpers would have their wage rates taken into account in the Secretary's determination of helpers' prevailing wages. *Ibid.* Accordingly, the court found the methodology for determining when a helper classification is "prevailing" to be consistent with the Davis-Bacon Act and the APA.

DISCUSSION

The decision of the court of appeals is correct, and it does not conflict with the decision of any other court of appeals or of this Court. Hence, further review is unwarranted.

1. a. The Davis-Bacon Act in relevant part requires that covered federal contracts "contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics" on similar projects in the area. 40 U.S.C. 276a(a). Thus, by its plain terms, "the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." Pet. App. 24a.

Where, as in Section 276a, Congress has made an "explicit delegation of substantive authority," the Secretary's rules implementing the statutory terms are "entitled to more than mere deference or weight," because Congress has "entrust[ed] to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term[s]." *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981). In those circumstances, "[a] reviewing court is not free to set aside [implementing] regulations simply because it would have interpreted the statute in a different way." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Rather, to prevail on judicial review, petitioners must carry the heavy burden of showing that the regulations bear no relationship to "any recognized concept" of prevailing wages, that they would defeat the purpose of the Davis-Bacon Act, or that they are otherwise arbitrary, capricious, or contrary to law. See *id.* at 426, 428; see also Pet. App. 29a (regulation

is subject to review to ensure that the Secretary "is acting consistently with the purposes of the statute and that his choice is not arbitrary").[3]

The regulations at issue in this case cannot be invalidated under that standard. In 1983, the court of appeals upheld the Secretary's regulation adopting the present definition of "helper," and this Court denied further review. *Building & Construction Trade Dep't* v. *Donovan*, 464 U.S. 1069 (1984). At the same time, however, the court of appeals also found that a helper classification could not be employed unless its use was "prevailing" in the relevant locality. Pet. App. 41a-44a. As the court explained, "if a given lower paid job classification need only be 'identifiable' in the community to be used on a government construction site, the wages paid for some work may well be less than those 'prevailing' for that work in the community." *Id.* at 42a. That, in turn, would be contrary to the purposes of the Davis-Bacon Act. *Id.* at 44a.

In response to that decision, the Secretary in 1989 promulgated the present regulations, limiting the use of helpers to federal projects in areas in which the use of helpers is a "prevailing" practice. Thus, a helper classification may be used only where it reflects the practice of contractors who pay the prevailing rate to the majority of journeymen in the area or who employ a majority of skilled and semi-skilled craft workers in the locality. 29 C.F.R. 1.7(d)(1) and (2) (1991).

[3] *Gray Panthers* involved a statutory provision leaving the question of "availab[ility]" of resources to be "determined in accordance with standards prescribed by the Secretary." 453 U.S. at 44 (emphasis omitted). In *Batterton*, the Court interpreted a statute providing that "unemployment" is to be "determined in accordance with standards prescribed by the Secretary." 432 U.S. at 418 n.2.

b. Petitioners contest the Secretary's approach on the ground that it allows the use of a helper classification where it is merely an "identifiable," not a "prevailing," practice. Pet. 12. That contention, however, is unsupported by the pertinent regulations, which reasonably define the circumstances in which the use of helpers is a "prevailing practice." If there is a single prevailing wage for journeymen—*i.e.*, a rate that is paid to a majority of the journeymen in an area—the Secretary treats as "prevailing" the practice of the contractors whose rates define the "prevailing" journeyman wage. 29 C.F.R. 1.7(d)(1). Where a group of contractors sets the prevailing practice for the wage rates of journeymen, there is no reason why the practices of that group should not also be deemed "prevailing" when they concern the classification for workers hired to assist those journeymen. In the absence of any such "majority wage," moreover, the Secretary has reasonably determined that the "prevailing" practice should reflect the practice of those contractors who employ a majority of the skilled and semi-skilled workers in a craft in the locality. See 29 C.F.R. 1.7(d)(2). While it is true that there may be other ways to define whether a classification "prevails" in a locality, petitioners have not demonstrated why the Secretary's definition of "prevailing"—which closely tracks the method used to determine a "prevailing wage" (29 C.F.R. 1.2(a)(1))—is irrational.

Petitioners counter, however, that the Secretary's methodology is flawed because it does not take into account "laborers," who may be performing semi-skilled work under the supervision of journeymen, in determining the prevailing practice. Pet. 12-14, 19-20. But that contention misconstrues the substance of the helper regulations, which in fact take such

"laborers" into account. As the court of appeals (Pet. App. 12a) and the district court (*id.* at 65a-67a) recognized, the regulations define "helper" not in terms of the label that the union or the employer attaches to its workers, but in terms of the workers' skill level and degree of their supervision; a "helper" is "a semi-skilled worker * * * who works under the direction of and assists a journeyman." 29 C.F.R. 5.2(n)(4). There is nothing in the Act or implementing regulations to suggest that such workers, even if the union denominates them "laborers," are to be excluded in determining whether a helper classification is "prevailing" or what the "prevailing wage" is for helpers in a locality where the classification is employed. See Pet. App. 11a-12a, 65a-66a.[4]

c. Petitioners also claim that the helper regulations violate the APA because the preamble to the new regulations states that semi-skilled helpers would only rarely displace unskilled laborers; that position, petitioners claim, is an unsupported departure from the Secretary's past assumption that low-wage

[4] Petitioners claim (Pet. 19-20) that the Secretary's position that laborers may be counted is merely a post hoc rationalization for an otherwise invalid rule. The Secretary's position, however, is fully evident from the definition of a "helper," which states without qualification that a "helper" is a semi-skilled worker who works under a journeyman's supervision. 29 C.F.R. 5.2(n)(4). And while it is true that the preamble to the new regulations notes that "for the most part, laborer classifications will not generally meet the definition set forth for the helper classification," 54 Fed. Reg. at 4,238, that observation is not equivalent to the proposition that a "laborer" will not count as a "helper" if he does satisfy the regulatory definition. Indeed, the Secretary rejected one proposal (advanced by petitioners) precisely because the availability of a helper classification would have turned on nomenclature or job title as such. *Ibid.*

helpers would replace higher-wage laborers. Pet. 15-19. The Secretary, however, has always assumed that helpers would substitute primarily for journeymen. When the Secretary initially promulgated the helper regulations in 1982 and proposed the present regulations in 1987, the agency's estimates of cost savings were based on alternative assumptions of substitution for journeymen alone and substitution for journeymen and laborers. See 52 Fed. Reg. at 31,368-31,371; 47 Fed. Reg. at 23,650-23,651. And in 1987 the Secretary predicted that the "[p]rincipal substitution is likely to be for journeymen." 52 Fed. Reg. at 31,370. Following a review of approximately 2,000 comments (including some submitted by petitioners) in light of the Department's enforcement experience under the Act, the Secretary in 1989 concluded that helpers would not be likely to substitute for laborers in any significant degree. 54 Fed. Reg. at 4,234, 4,237-4,238, 4,242.

To be sure, the Secretary acknowledged that union "laborer" rates may be higher than open-shop "helper" rates. 54 Fed. Reg. at 4,242. That does not compel the conclusion, however, that helpers will widely replace laborers. First, the primary incentive will be to replace journeymen with helpers, since journeymen are routinely the highest paid workers. Second, as the Secretary explained in promulgating the present regulations, "where the majority rate prevails for the journeymen and union rates are [thus] found to be prevailing in the area, the decision rule is not likely to produce a finding of prevailing helpers." *Ibid.* And where there is no majority rate and the weighted-average method is used to determine whether to recognize a helper classification

typically in open shop or mixed areas[5]—then semi-skilled helper rates will likely be above unskilled laborer rates. *Ibid.* Where that is the case, "there will be no economic incentive for contractors to replace laborers with helpers." *Ibid.*[6]

Further, the district court was correct in holding (Pet. App. 67a) that "the analytical statement that helpers will generally not substitute for laborers does not affect the implementation of the regulation or its rationale, and it therefore does not affect the validity of the rule." With respect to the cost saving rationale for the revision, the Secretary had estimated that substantial cost savings would result whether helpers substituted only for journeymen or for journeymen and laborers. See 52 Fed. Reg. at 31,370. In addition, the question whether helpers will in fact replace laborers has no effect on the underlying justification for the revisions adopted by the Secretary. As discussed, in the exercise of her broad discretion to define "prevailing wages" under the Davis-Bacon Act, the Secretary has devised a rational and workable method for determining whether the helper classification prevails in a particular area. Even if petitioners were correct that this rule may result in some substitution of lower-cost helpers for

[5] As the Secretary explained, "[w]here there is no 'majority' journeyman rate and the weighted average rule controls, then it is likely that the projects surveyed will be predominantly open shop or a mixture of open shop and union projects." 54 Fed. Reg. at 4,238.

[6] We are advised by the Department of Labor that, in any case, if a contractor classifies as "helpers" workers who do not meet the "helper" definition, the workers will be found to be misclassified, and the contractor will be required to pay the workers the difference between the rate paid and the applicable rate for the work performed.

higher-cost union laborers, the Davis-Bacon Act is not a guarantee of the most favorable possible wages; it merely requires contractors on covered projects to pay the wages "prevailing" in an area. 40 U.S.C. 276a(a). Previously, federal wages on covered projects, "rather than being below those in the private sector, [were] in some cases far above." Pet. App. 52a. By recognizing helper classifications where the use of helpers is a prevailing practice, the new rules directly advance the statutory objective of seeing that the wages received by workers on covered federal projects reflect current construction industry practices in each geographic area.

2. In challenging the new helper regulations, petitioners rely heavily (Pet. 20-30) upon the Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, § 303, 105 Stat. 151, which provides in pertinent part:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of title 29 of the Code of Federal regulations or to implement or administer any other regulation that would have the same or similar effect.

Petitioners' reliance, however, is misplaced. Consistent with settled principles governing the interpretation of substantive riders to appropriations Acts, the court of appeals correctly held that Section 303 only barred the Secretary from expending funds to

administer and implement the helper regulations during Fiscal Year 1991—the year in which the pertinent appropriations Act was in effect. Pet. App. 7a-9a.

"Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the year covered." General Accounting Office, *Principles of Federal Appropriations Law* 2-29 (2d ed. 1991). Accordingly, a proviso contained in such an Act is presumed not to be permanent unless Congress has clearly expressed its intent to the contrary. As Justice Story explained for the Court in 1841:

> It would be somewhat unusual, to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.

Minis v. *United States*, 40 U.S. (15 Pet.) 423, 445 (1841); accord, *United States* v. *Vulte*, 233 U.S. 509, 514-515 (1914); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1203-1204 (11th Cir. 1989). Here, the operative language does nothing to indicate that Congress intended the proviso to be permanent. Pet. App. 9a. Because Congress has at its ready disposal well established terms of art that convey futurity or permanence, see, *e.g.*, *Cella* v. *United States*, 208 F.2d 783, 790 (7th Cir. 1953) ("use of the word 'hereafter' by Congress as a method of making legislation permanent is a well-known practice"), cert. denied, 347 U.S. 1016 (1954), the court of appeals was correct in

reading Congress's failure to include any language of futurity or permanence as a strong indication that the proviso was intended to expire with the appropriation Act at the end of Fiscal Year 1991.[7]

Indeed, a supplemental appropriations bill passed by the House of Representative on July 28, 1992, provides that "no funds shall be expended hereafter by the Secretary of Labor to implement or administer [the helper regulations]." H.R. 5620, 102d Cong., 2d Sess. § 301 (1992). On September 15, 1992, the Senate also passed H.R. 5620, including the permanent rider relating to the helper regulations. See 138 Cong. Rec. S13, 446 (daily ed.). That rider, however, was ultimately deleted from the bill in response to a threatened veto. See Daily Lab. Rep. (BNA) No. 183, at A-13 (Sept. 21, 1992); 138 Cong. Rec. S14, 027, S14,038-S14,039 (daily ed. Sept. 18, 1992). Nevertheless, the recent legislative action not only confirms that this Congress knows how to use settled terms of art to confer permanency on the appropriations bar at issue,

[7] It is true that the proviso at issue, as part of an emergency supplemental appropriation bill, did not accompany the Department of Labor appropriation to which it applies—a factor recognized as some indication of permanence (see *Principles of Federal Appropriations Law*, *supra*, at 2-31 to 2-32). Petitioners also cite (Pet. 26-27) scattered floor statements suggesting that some Members of Congress understood the rider to be permanent. However, the presence or absence of words of futurity "remains the crucial factor, and [such] additional factors have been used for the most part to support a conclusion based on this presence or absence." *Principles of Federal Appropriations Law*, *supra*, at 2-33. The court of appeals therefore properly declined either to infer "from the absence of an appropriation standing alone that Congress intended to impose a permanent ban," or to allow petitioners to use legislative history to "reconstruct" a statute whose language contains no suggestion of futurity. Pet. App. 9a.

but also that the political branches have focused directly on the matter at issue here. In the absence of any conflict among the court of appeals, further review of the court of appeals' decision is unwarranted. [8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
ROBERT M. LOEB
Attorneys

SEPTEMBER 1992

[8] Petitioners also contend that the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-170, 105 Stat. 1107 (1991), supports a permanent bar against implementing the helper regulations. Pet. 27-30. Congress, however, appropriated (105 Stat. 1110) $231,326,000 of unrestricted funds for the Employment Standards Administration of the Department of Labor, which implements the Davis-Bacon Act. While the Act contains several provisions barring the Secretary from expending funds on various matters, see §§ 102-104, 105 Stat. 1114, it did not restrict the ESA from spending any part of its appropriation to implement the helper regulations. In the absence of any such prohibition, the Secretary is free to spend any part of the $231 million appropriated for that purpose. See *International Union, United Automobile Workers* v. *Donovan*, 746 F.2d 855, 860-861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985).